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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

November 4, 2003

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JASON P. SNYDER and BRANDI M. SNYDER, Debtors.	BAP No. UT-03-055
JASON P. SNYDER and BRANDI M. SNYDER, Appellants, v. KEY BANK USA, N.A.; GARY E. JUBBER, Trustee; and UNITED STATES TRUSTEE, Appellees.	Bankr. No. 02T-32905 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the District of Utah

Before BOHANON, CORNISH, and McNIFF, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtors Jason P. Snyder and Brandi M. Snyder ("Debtors") appeal an order of the United States Bankruptcy Court for the District of Utah denying their motion to

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

reopen their closed Chapter 7 case. For the reasons set forth below, we affirm.

BACKGROUND

Debtors filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code on August 5, 2002. On September 13, 2002, the Trustee filed a final report certifying that the estate had been fully administered. No objection to the final report was filed, and on November 13, 2002, the bankruptcy court entered an order discharging the Debtors and an order closing the case.

On January 28, 2003, the Debtors filed a motion to reopen the case, which was denied by order entered March 27, 2003. That order was not appealed and is not before this Court.

On June 4, 2003, the Debtors filed another motion to reopen the case. The bankruptcy court's docket reflects that the court held a hearing on June 30, 2003, that counsel for the Debtors and counsel for Appellee Key Bank appeared at the hearing, and that the court denied the motion. *See* Minute entry dated June 30, 2003, *in* Debtors' Appendix at 3. The Debtors filed a premature notice of appeal on July 28, 2003, and the bankruptcy court's order denying the motion was entered August 1, 2003. The bankruptcy court's order provides:

> Debtor's Motion to Reopen Chapter 7 Case came on regularly for hearing, pursuant to notice, before the above-entitled court, The Honorable William T. Thurman presiding, on Monday, June 30, 2003 at 3:00 p.m., and Debtors Jason P. Snyder and Brandi M. Snyder being represented by Jay L. Kessler, and Key Bank, U.S.A. being represented by Kim R. Wilson, and the Court having considered the files and records herein and having heard argument of counsel, and having made its ruling on the record, and being fully advised in the premises, and good cause appearing therefore, it is hereby
>
> ORDERED, ADJUDGED AND DECREED, that Debtor's Motion to Reopen Chapter 7 Case is denied.

Order, *in* Debtors' Appendix at 34.

APPELLATE JURISDICTION

This Court has jurisdiction over this appeal. The bankruptcy court's order is a final order subject to appeal under 28 U.S.C. § 158(a)(1). *See Quackenbush v.*

Allstate Ins. Co., 517 U.S. 706, 712 (1996). The Debtors timely filed their notice of appeal under Federal Rule of Bankruptcy Procedure 8002, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Utah. Fed. R. Bankr. P. 8001-02; 28 U.S.C. § 158(c)(1).

STANDARD OF REVIEW

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

A bankruptcy court's decision on a motion to reopen a closed case under 11 U.S.C. § 350(b) is reviewed for abuse of discretion. *Woods v. Kenan (In re Woods)*, 173 F.3d 770, 778 (10th Cir. 1999); *Nintendo Co. v. Patten (In re Alpex Computer Corp.)*, 71 F.3d 353, 356 (10th Cir. 1995); *Watson v. Parker (In re Parker)*, 264 B.R. 685, 691-92 (10th Cir. BAP 2001). "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (further quotation omitted)).

DISCUSSION

The Debtors argue that the bankruptcy court gave "no legal reason" for denying their motion and that the court committed legal and factual errors in denying their motion. Brief of Debtors at 8. Each argument will be discussed in turn.

Sufficiency of Reasoning

Ordinarily a bankruptcy court is required to make findings of fact and conclusions of law, either in writing or stated orally and reported in open court following the close of the evidence. *See* Fed. R. Civ. P. 52 (stating requirement); Fed. R. Bankr. P. 7052 (Rule 52 applies to adversary proceedings); Fed. R. Bankr. P. 9014 (Rule 7052 applies to contested matters). When a motion does not rise to the level of a contested matter, the requirement that the court make findings does not apply; however, it is a "salutary practice to give the litigants, either orally or in writing, at least a minimum articulation of the reasons for its decision." *Interpace Corp. v. City of Philadelphia*, 438 F.2d 401, 404 (3d Cir.1971).

The bankruptcy court's order states that its ruling was made on the record. The record before this Court does not include a transcript of the bankruptcy court's oral ruling. Without the transcript, this Court cannot determine whether the bankruptcy court made findings of fact or conclusions of law or provided at least a minimum articulation of the reasons for its decision.

Legal and Factual Errors

Section 350(b) of the Bankruptcy Code provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The Debtors allege that they presented sufficient cause to the bankruptcy court to justify reopening their case. In their brief, they argue that Debtor Jason Snyder did not receive an educational benefit from a student loan he received; that the student loan is therefore dischargeable; that they should be allowed to pursue an adversary proceeding to discharge the student loan; that res judicata does not apply; and that the bankruptcy court's order deprives them of their fresh start.

Without a transcript of the hearing, this Court cannot determine which of the above arguments were made to the bankruptcy court. *See Walker v. Mather (In re*

Walker), 959 F.2d 894, 896 (10th Cir. 1992) (appellate courts do not consider issues that were not raised or were abandoned below). Without a transcript of the bankruptcy court's oral ruling, this Court cannot determine whether the bankruptcy court considered the arguments made by the Debtors, and if the arguments were rejected, the reasons why the arguments were rejected. The lack of transcript prevents this Court from reviewing any alleged errors of law or fact. *See McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir. 1992); *In re Rambo*, 209 B.R. 527, 530 (10th Cir. BAP), *aff'd*, 132 F.3d 43 (10th Cir. 1997).

Obligation to Provide Record

Rule 8009 of the Federal Rules of Bankruptcy Procedure requires an appellant to file with his brief excerpts of the record as an appendix, which must include the following:

(1) The complaint and answer or other equivalent pleadings;
(2) Any pretrial order;
(3) The judgment, order, or decree from which the appeal is taken;
(4) Any other orders relevant to the appeal;
(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
(6) Any motion and response on which the court rendered decision;
(7) The notice of appeal;
(8) The relevant entries in the bankruptcy docket; and
(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

Fed. R. Bankr. P. 8009(b). This Court's local rule 8009-1 provides: "The appendix must contain all transcripts, or portions of transcripts, necessary for the court's review." 10th Cir. BAP L.R. 8009-1(b)(5).

"'[I]t is counsel's responsibility to see that the record excerpts are sufficient for consideration and determination of the issues on appeal and the court is under no obligation to remedy any failure of counsel to fulfil that responsibility.'" *Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321, 1323 (10th Cir. 1993) (quoting *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir.1992) (further citation omitted)). Without the transcript of the

bankruptcy court's oral ruling, this Court cannot form a definite and firm conviction that the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. As the Tenth Circuit has held:

> As this case illustrates, failure to file the required transcript involves more than noncompliance with some useful but nonessential procedural admonition of primarily administrative focus. It raises an effective barrier to informed, substantive appellate review.

McGinnis, 978 F.2d at 1201. On the record before this Court, the bankruptcy court's order denying the Debtors' motion to reopen must be affirmed.

CONCLUSION

For the reasons set forth above, the bankruptcy court's order denying the Debtors' motion to reopen is AFFIRMED.